No. 3764

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. L. NIDAY and MOLLIE GREEN NIDAY, GEORGE A. BUELL and EFFIE ADA BUELL, and A. L. GREEN,
Appellants,

vs.

JULIA GREEN GRAEF,
Appellee and Cross Appellant.

BRIEF OF APPELLEE

PLATT & PLATT, MONTGOMERY & FALES,
Solicitors for Appellee.

IRWIN-HODSON

INDEX

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STATEMENTS OF FACTS.

This is a suit to set aside two deeds.

The deeds were procured from an old man over eighty years of age, at a time when his mind was no longer a safe guide for his actions.

These deeds were so procured by the appellant, J. L. Niday.

J. L. Niday was at that time, and still is, a lawyer, practicing in Boise, Idaho.

He was the attorney for the old gentleman from whom he procured these deeds.

He was the son-in-law of the old gentleman from whom he procured these deeds.

He was the confidential advisor of the old gentleman from whom he procured these deeds.

He was the life-long friend of the old gentleman from whom he procured these deeds.

The deeds in question covered two hundred twelve acres of land located in Canyon County, Idaho.

These lands comprised a ranch, which was commonly known as, "Greenhurst."

The ranch was named for a man by the name of R. E. Green, who was one of the old-time settlers of Nampa, Idaho.

This ranch was the residence of Mr. Green and his family, which was comprised of his wife and six children.

His wife was a woman of strong character and of great business capacity, and she was virtually the active manager of this ranch.

Mr and Mrs. Green had a very happy domestic relation, and he relied very strongly upon her judgment.

They made this ranch their home in the year 1900.

In 1909, Mrs. Green was very suddenly killed in an accident.

Her sudden death had a very serious effect upon Mr. Green.

From the time of her death down until the time of his own death, in March, 1917, Mr. Green underwent a steady and continuous mental and physical decline.

In the spring of 1914, the appellant, J. L. Niday, acting in conjunction with his wife, determined that it was necessary to move Mr. Green from Nampa, Idaho, to Boise, Idaho.

The primary reason for this change was the physical and mental condition of Mr. Green.

He was no longer able to properly take care of himself and run the affairs upon his ranch in Nampa, Idaho.

In fact, Mr. Niday telegraphed to a sister-in-law of Mr. Green's, residing in Ohio, to come west and take care of Mr. Green.

See Transcript, p. 88.

The name of this sister-in-law was Mrs. Carrie Wager.

She came to Nampa, Idaho, in the summer of 1914.

At that time, Mr. Green was moved to Boise, Idaho, and placed in a house belonging to Mr. Niday.

Mr. Green remained in this house, under the care of Mrs. Wager, until the time of his death, in March, 1917.

On the 22nd of December, 1914, Mr. Green executed and delivered to J. L. Niday a warranty deed covering a tract of six acres out of the two hundred twelve acres already referred to.

This deed was withheld from the public records from December 22, 1914, until February 19, 1916.

On October 1, 1915, about eleven months after the execution of this deed, Mr. Green executed and delivered to Mr. Niday a second deed, covering two hundred six acres, being the balance of the property included in the home place called "Greenhurst."

This deed was withheld from record from October 1, 1915, until May 27, 1916.

Upon the trial of this case, Mr. Niday gave the following reasons for withholding this deed from record.

He stated that at the time when he procured this deed from Mr. Green, he desired to obtain from the State Land Board of Idaho a loan of $5,000.

He further stated that no one person could borrow more than $5,000.

He further stated that he already had a loan in that amount.

He, therefore, asked Mr. Green to make an application to the State Land Board for a loan in this amount.

If, however, the deed from Mr. Green to himself had been placed of record, Mr. Green would not have been able to obtain this loan, because the record would have shown the title in Mr. Niday.

Therefore, in order to deceive the officials of the State of Idaho, he withheld this deed from record.

See Transcript, p. 119.

The deception was not successful.

The Land Board refused the loan.

Following the execution of these deeds, Mr. Green remained in the house owned by Mr. Niday until March, 1917, when he died.

From the time of the removal of Mr. Green from Nampa to Boise, Idaho, in 1914, until the time of his death, Mr. Niday acted in the capacity of his attorney, his advisor, and his apparent friend.

In addition to this, he was a son-in-law of Mr. Green.

During the year 1914, he compelled Mr. Green to sign a letter addressed to a friend by the name of George H. Moore, which letter was abusive in character.

See Transcript, pages 76-78.

Mr. Moore resided at Nampa, Idaho.

After the writing of the letter, Mr. Green went to Mr. Moore and apologized for it, saying that Mr. Niday had made him write it.

Mr. Green also stated to his sister-in-law, Mrs. Egbert, that he had just written the meanest letter he had ever written, and that Mr. Niday had compelled him to sign it.

See Transcript, p. 94.

A short time before Mr. Green's death, Mr. Niday endeavored to arouse him from a stupor, in order to procure his signature to a paper.

See Transcript bottom pp. 70, 89.

Julia Green Graef, the appellee in this case, is a daughter of R. E. Green, deceased.

Knowledge of the existence of the deeds from Mr. Green to Mr. Niday was withheld from Julia Green Graef until the spring of 1918, over a year after her father's death.

Knowledge of the execution of these deeds was withheld from another daughter of Mr. Green, Mrs. Acuff, until after her father's death.

Knowledge of the execution of these deeds was withheld from Philo F. Green, a son of Mr. Green, until after the death of his father.

Mrs. J. L. Niday, who was a daughter of R. E. Green and the wife of J. L. Niday, apparently knew of these deeds prior to her father's death.

The other two sons, Jack Green and Jim Green, apparently knew of these deeds prior to their father's death, and after their father's death conveyed their interest in the property to J. L. Niday.

One of these sons, Jack Green, appeared upon the trial of this case and attempted to commit perjury.

The other son, Jim Green, did not appear upon the trial.

When Julia Green Graef learned of these deeds, more than a year after her father's death, she entered into correspondence with J. L. Niday, and asked him for an explanation of the transactions.

As a result of this request, negotaiations were had for a possible settlement with herself and the other heirs, but Mr. Niday finally refused to carry out the terms of settlement.

In December, 1918, Mr. Niday sold the property covered by these deeds for a consideration of **$30,000.**

Thereafter, a suit was instituted by Julia Green Graef; her sister, Mrs. Acuff; and her brother, Philo Green, to have these deeds set aside on the ground that

they were improperly obtained from their father, while acting under the influence of J. L. Niday.

This suit was instituted in the county where the property was located, and on motion was removed to the City of Boise, Idaho, *where Mr. Niday resided and practiced law.*

Subsequently to this removal, the brother and sister who had joined with Julia Green Graef, became dissatisfied with the delay of the litigation, finding themselves in need of money, and asked Julia Green Graef to purchase from them their interest in the litigation.

This she did, by borrowing from her husband.

This act made her the sole party plaintiff, because the other brothers had released their interest to Mr. Niday for a consideration.

Julia Green Graef was a resident of the State of Oregon, and therefore dismissed the case which was pending in the State Courts of Idaho, and brought the present action in the Federal Court for that district, on the ground of diversity of citizenship.

The case came on for trial on the 4th day of October, 1920, before his Honor, Judge Dietrich, and after a full and complete hearing the court rendered a decision in favor of the plaintiff, Julia Green Graef.

It is from this decision that the present appeal has been taken by J. L. Niday and Mollie Green Niday, his wife.

The parties to whom the property was conveyed by Mr. Niday, were made parties defendant in the case, and it was stipulated at the close of the trial that if a decree was rendered in favor of the plaintiff, the title which she thereby acquired could be confirmed in the purchasers, and the plaintiff would accept the position of mortgagee to the extent of the interest which she represented.

The decision rendered by the trial court contained a full and complete series of findings, and announced the rules of law applied to the facts as found.

This decision appears upon pages 37 to 49, inclusive, of the Transcript of Record, and may briefly be summarized as follows:

The court found from the evidence, the following facts:

That the defendant J. L. Niday was an attorney at law.

That Mr. R. E. Green was one of the old settlers of Nampa, Idaho, and a man trained in the profession of civil engineering, and likewise educated in literature and the fine arts.

That Mr. Green was a man having a capacity for administration and office details, though not possessing in a high degree the qualities requisite to independent enterprising.

That in 1909 his wife, who assumed the leadership in his business affairs, suddenly died as a result of an accident.

That, grief-stricken and under the necessity of taking the initiative without his wife, he became involved in debt.

That in 1914 he was induced by J. L. Niday and some of his children to move to Boise, Idaho.

That he was then 78 years of age.

That he was placed in a small home, rented for him, together with his mother-in-law and his sister-in-law.

That J. L. Niday and his wife also lived at Boise, in close proximity to Mr. Green, and the other children lived at distant points.

That for twenty years prior to 1914, J. L. Niday had been on very intimate terms with Mr. Green, by virtue of family ties, professional relations, and friendly associations.

That he looked to J. L. Niday, instead of his sons, for guidance.

That with the assistance of J. L. Niday, he negotiated terms of settlement by which they satisfied all outstanding unsecured claims, in consideration of deeds to mortgaged property.

That upon completing this settlement he deeded to J. L. Niday six acres of land, on December 22, 1914,

for the expressed consideration of one dollar, and said deed was withheld from record until February 19, 1916.

That on October 1, 1915, he executed another deed with a consideration of one dollar and other considerations, covering two hundred six acres, subject to a mortgage of ten thousand dollars and another in the sum of one thousand, six hundred eighty-three dollars, eighty-five cents.

That this deed was withheld from record until May 27, 1916.

That in the early part of 1916 Mr. Green had a severe attack of pneumonia, from which he never fully recovered.

That Mr. Green was in an extreme case of second childhood, brought on by old age and hastened by the shock of his wife's death and the consciousness of business defeat.

That in his settlement with strangers he was protected by the zealous and able assistance of J. L. Niday, but that in dealing with J. L. Niday, however, a member of his own family and a close personal friend, and in whom he had implicit confidence, *he was unaided,* and alone.

> That "against such a one he would have neither the capacity to be wary nor the strength of will to make resistance."

Transcript. p. 41.

From these facts, the court then deduced the following conclusion, with reference to the plaintiff's case and the burden of proof.

> "In view of his mental condition and the relation of confidence which had long existed between him and the defendant, no transfer by which the latter would secure any undue advantage could be permitted to stand, even though there might be no actual intent to defraud or overreach. In such a case the burden would be put upon the defendant to show the fairness of the transaction."

Transcript, bottom p. 41, top p. 42.

The court then continued to review the evidence offered by the defendant with reference to the transfers and found:

That the minimum value of the property at the time of the transfers was fifteen thousand dollars.

That such value left Mr. Green an equity of at least three thousand in excess of indebtedness.

That the defendant attempted to offset this three thousand dollars by a bill for professional services, *which was unitemized and had never been submitted to Mr. Green.*

> That "it is clear, I think, that there was never any intention to make a charge."

Transcript, p. 43.

That without advising Mr. Green of the consequences of the suggested step or attempting to dissuade him therefrom, the defendant accepted the offer of sale and prepared the deed, which was executed and delivered.

> That, "upon such delivery the grantor, a helpless old man, stood penniless."

Transcript, p. 43.

From these facts, the court concluded as follows:

> "In view of all the circumstances, the transfer to the defendant was not merely improvident; unless attended by an understanding that the title was to be taken in trust, or that the defendant assumed some obligation of support, touching which there is no testimony, the act was scarcely rational."

Transcript, p. 43.

The court then found that even if the land was worth only fifteen thousand dollars, that nevertheless there was a substantial margin in favor of Mr. Green.

The court also was of the opinion that if a shrewd business man had loaned approximately twelve thousand dollars on the property, that the land must have been worth more than fifteen thousand dollars.

With these observations in mind, the court then concluded that:

> "Under the undisputed facts and the explanation of the defendant, it is unthinkable that either

> he, as a disinterested party, or any other competent person, would have advised or approved of such a transfer. Added to the inherent unreasonablesness of the transactions, if we assume the deeds to have been absolute and without other consideration, is the circumstance that both instruments were, for a long time, withheld from record, and that in the case of each, after its execution and delivery, the grantor, acting under the direction of the defendant, represented to public officials that he was still the owner * * * It is sufficient to say that no theory or explanation of the transaction has been suggested upon which the transfers can be sustained."

Transcript of Record, p. 44.

After announcing the above conclusions, the court then cited the universal rule that where a fiduciary relation exists, a purchase by the trustee casts upon such trustee or confidential advisor the absolute burden of showing the fairness of the transaction.

The court further held that the evidence of the defendant had failed to establish this burden.

The court also found from the facts, and concluded as a matter of law, that the defense of laches had not been established by the defendant.

This appeal directly attacks the sufficiency of the court's findings of fact, and challenges the court's legal conclusions.

There is also raised a question of jurisdiction in permitting the plaintiff to take an assignment of claims from her brother and sister, but this is incidental to the main relief, and we will discuss it at a further stage in this brief.

It is the contention of the appellee that the decree of the court should be affirmed, and as a basis for such affirmance she submits the following:

POINTS AND AUTHORITIES.

I.

"It is the established rule that the findings of the trial court in a suit in equity must be taken as presumptively correct, and that unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings will not be disturbed by the appellate court. This rule is especially applicable in a case in which, as here, the testimony was taken in open court, where the trial court had the opportunity to observe the demeanor of the witnesses and their manner of testifying, and the appellate court has before it only a condensed printed statement of the evidence as it is presented under the new equity rule. Thorndyke v. Alaska Perseverance Mining Co., 164 Fed. 657, 90 C. C. A. 473; Brandt v. United States, 198 Fed.

449, 117 C. C. A. 208; Harper v. Taylor, 193 Fed. 944, 113 C. C. A. 572."

Tobey v. Kilbourne, 222 Fed. 760, 763 (C. C. A. Ninth Circuit.)

II.

This is a suit to set aside deeds and declare a trust on the ground that they were obtained from a man whose mind was no longer a safe guide for his actions.

III.

"The legal principles involved are not intricate nor difficult of application. Where deeds are obtained by the exercise of undue influence over a man whose mind has ceased to be a safe guide to his actions, it is against conscience for him who has obtained them to derive any advantage therefrom."

Crabb vs. Watts, 249 Fed. 357, 365 (Or.).

Affirmed, Crabb vs. Watts, 257 Fed. 718 (C. C. A. Ninth Circuit).

IV.

"But it is not necessary, in order to secure the aid of equity, to prove that the grantor was at the time insane or in such a state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that, from sickness and infirmity, he was at the time in a condition of mental weakness, and that there was gross in-

adequancy of consideration for the conveyance. From such circumstances, imposition or undue influence will be inferred."

Crabb vs. Watts, 249 Fed. 357, 365.

Affirmed, Crabb vs. Watts, 257 Fed. 718.

V.

"A fiduciary relation existing between the grantor and those concerned in securing a benefit under the terms of the grant raises a presumption against validity, and casts the burden of establishing good faith upon the person asserting the regularity of the transaction. * * * and the secrecy with which the transaction is accomplished often furnishes a badge of fraud."

Crabb vs. Watts, 249 Fed. 357, 365.

Affirmed, Crabb vs. Watts, 257 Fed. 718.

VI.

"Whenever a fiduciary relation exists, legal or actual, whereby trust and confidence are opposed on the one side and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy as a protection against overweening confidence will interpose to prevent a man from stripping himself of his property."

Highberger vs. Stiffler, 21 Md. 352.

VII.

"The law looks with a jealous and inquiring eye on a deed made by an old and infirm person to a young relative or associate for inadequate consideration, where the grantee has opportunity to influence the mind of the grantor, especially where no reasonable provision has been made by the grantor for his own children or nearest blood relation."

Price vs. Meade, 207 S. W. 695, 697 (Ky. 1919).

VIII.

"The law is well settled that if an attorney purchases any property belonging to his client—not property which is at the time in litigation—the transaction is viewed with suspicion, and he assumes the heavy burden of proving that the transaction is characterized by the utmost fairness and good faith, and not tainted with fraud or undue influence, and that the client acted upon the fullest information and advice."

Sampliner vs. Motion Picture Patent Co., 255 Fed. 242, 246.

IX.

A grantor dealing with a confidential advisor, and to whom he has conveyed property, should receive the benefit of the independent advice of a disinterested, competent advisor.

Young vs. Love, 65 So. 337, 338.

Nesbit vs. Lockman, 34 N. Y. 167; 42 Mo. 483; 68 N. J. Eq. 664; 40 Ark. 28; 2 Q. B. 679; 141 Mass. 329; 186 Ill. 225; 86 Va. 793; 91 Pac. 348; 31 Barb. 9; 63 Md. 371; 22 N. C. 252.

X.

Laches is a question of fact, and such question of fact has been determined in this case by the trial court.

XI.

Laches is a question of fact in each particular case, and is never invoked to defeat justice, and never applied unless unusual conditions require its application.

Smith vs. Smith, 224 Fed. 1, 6 (C. C. A. Ninth Cir.).

XII.

Where the party interposing a defense of laches has contributed to or caused the delay, he cannot take advantage of it.

Northern Pac. vs. Boyd, 177 Fed. 804, 824.

XIII.

Where a conveyance is made in a confidential relation, the presumption is against the propriety of the transaction, and this presumption must be overcome by

evidence other than the ordinary evidence of the execution of the deed such as the appearance before a notary.

Nesbit vs. Lockman, 34 N. Y. 167, 170.

XIV.

"If the fiduciary relation of guardian and ward, existed at the time of the execution of the gift or devise, and the parties were so situated with reference to each other, that undue influence could have been used, the law presumes that it was used, and those seeking to derive advantage from it must rebut the presumption by *competent and convincing* proof. This presumption rests upon three facts for its formation; first, the fiduciary relation; second, the gift or devise to, or in the interest of, the guardian; third, an opportunity for an exercise of undue influence."

Cornet vs. Cornet, 154 S. W. 121, 137, 138.

XV.

An assignee of a claim purchased bona fide and for a consideration may sue in his own name, and the motive of the assignment will not be inquired into.

Dickerman vs. Northern Trust Co., 176 U. S. 181.

Cross vs. Allen, 141 U. S. 528.

Lanier vs. Nash, 121 U. S. 404.

XVI.

A suit to enforce rights to a trust estate can be maintained in the Federal Court by an assignee of the interest.

Brown vs. Fletcher, 235 U. S. 589.

ARGUMENT.

The argument of this case, from the standpoint of the appellee, is confined within very narrow limits.

The case involves, primarily, pure questions of fact.

Those questions are as follows:

Did a confidential relation exist between the appellant, Niday, and R. E. Green, deceased?

Did Mr. Green, during the period of that confidential relation, make a conveyance of property to the appellant, Niday?

Did the appellant, Niday, pay Mr. Green dollar for dollar in value for the property received?

At the time of this conveyance was Mr. Green in a condition such that his mind was no longer a safe guide for his actions?

If a confidential relation existed; if a conveyance was made; if the consideration was not entirely adequate; and if Mr. Green's mind was no longer a safe

guide for his actions, then it follows, as a matter of law, that the conveyance is presumed to have been obtained by undue influence, and should, therefore, be set aside.

> "If the fiduciary relation of guardian and ward, existed at the time of the execution of the gift or devise, and the parties were so situated with reference to each other, that undue influence could have been used, the law presumes that it was used, and those seeking to derive advantage from it must rebut the presumption by *competent and convincing* proof. This presumption rests upon three facts for its formation; first, *the fiduciary relation;* second, *the gift or devise to, or in the interest of the guardian;* third, *an opportunity for an exercise of undue influence.*"

Cornet vs. Cornet, 154 S. W. 121, 137, 138.

Upon the trial of this case, all of these facts were found in favor of the appellee, and under the established rule announced by this court (222 Fed. 763) the findings of the trial court must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings will not be disturbed by this court.

It remains only to ascertain whether or not there is evidence to support the findings of the court, and then ascertain the correctness of the rules of law applied to those findings.

A detailed history of the facts shown by the record appears in our opening statement.

We will, therefore, endeavor to confine this argument to a very brief resume of the evidence establishing these facts.

It is admitted that Mr. Niday was a son-in-law of Mr. R. E. Green.

It is admitted that Mr. Niday was a lawyer, practicing at Boise, Idaho.

Upon the trial of this case, Mr. Niday denied in his amended answer that he was the attorney for Mr. Green at the time when these conveyances were taken, or that he was the attorney for Mr. Green subsequent to the conveyances.

See p. 30, par. IV, Transcript of Record.

While on the witness stand, however, Mr. Niday's attention was called to a contract that was prepared in November, 1914, by which Mr. Green conveyed his property to some mortgagees, and Mr. Niday admitted that he undoubtedly looked it over for Mr. Green.

See Transcript, p. 120.

Again, while on the witness stand, Mr. Niday's attention was called to an answer which he had filed in the State Court for Canyon County, Idaho, which answer recited, amongst other things, as follows:

> "These defendants deny that said R. E. Green was greatly influenced by the opinion and judgment of the said J. L. Niday, except upon occasions when the said R. E. Green consulted said J. L. Niday as attorney at law and requested his opinion upon matters of law."

See Transcript, p. 122.

In addition to all of the above, Mr. Niday asserted, while on the witness stand, that he had been ocassionally consulted as an attorney by Mr. Green since 1896 and up to the year 1914 and '15.

See Transcript of Record, p. 134.

He also asserted that the reasonable value of such services was $3,000.00 or $4,000.00, and this happens to amount to the difference between the mortgage on the property in controversy and its minimum value as fixed at $15,000.00.

Again, on p. 117 of the Transcript of Record, Mr. Niday testified as follows:

> "He (i. e. Green) sought me a great deal, came to my office almost daily after he was sick, and if I was busy would wait in the office until he could see me."

From the above facts the court concluded that there existed between Mr. Niday and Mr. Green the relationship of attorney and client, and that of close friendship.

It thus appears that the court's findings in this particular are amply supported by the appellant's evidence.

The very fact that Mr. Niday would go upon the stand and testify that he had been the attorney for Mr. Green from 1896 down until 1914 and '15, and then deny in his answer that he was the attorney for Mr. Green in 1914 and '15, when these conveyances were made, very perfectly establishes the kind of influence to which Mr. Green must have been subjected during his declining years.

This is doubly true when we take into consideration the further fact that in the year 1916 the same Mr. Niday endeavored to get Mr. Green to represent to public officials that he was still the owner of the land after he had conveyed it to Mr. Niday.

It should also be remembered in this connection that this is the same Mr. Niday who withheld the deeds from public record for a considerable period after their execution and delivery, and then concealed from the appellee in this case—one of the daughters of Mr. Green—any knowledge concerning the existence of the deeds until more than a year after the death of her father.

It is admitted that the transfers in question were made from Mr. Green to Mr. Niday.

It is admitted that these transfers stripped Mr. Green of his last vestige of property.

The lowest estimate placed upon the two hundred twelve acres of land by the witnesses for the appellant, himself, was between $15,000.00 and $16,000.00.

See Transcript, p. 127.

The mortgages upon the property plus some accumulated interest totaled $12,187.44.

See Transcript, p. 111.

This left a margin of approximately $3,000.00 in favor of Mr. Green, taking the property at its lowest valuation.

It, therefore, appears that Mr. Niday did not pay Mr. Green dollar for dollar for the property which he received, and that the consideration was grossly inadequate, when it is remembered that this was the last dollar which Mr. Green possessed.

In order to supply this deficiency, Mr. Niday introduced evidence to show that he had performed legal services for Mr. Green of a value aggregating $3,000.00 or $4,000.00.

This statement was unitemized, and there was no evidence introduced to show that the bill was ever presented to Mr. Green.

The court, therefore, found that it was never intended that such a bill should be presented, and likewise found that the consideration for these transfers was inadequate.

In view of this evidence; in view of the situation surrounding Mr. Green; in view of the fact that he was close to 81 years of age; in view of the fact that a confidential relation existed between himself and Mr. Niday,

can it be even suggested that the trial court has made any "serious or important mistake in the consideration of such evidence."

If not, then the court's finding in this particular must be affirmed. (222 Fed. 763.)

This evidence establishes the first propositions announced at the beginning of this argument, to-wit, that a confidential relation existed between Mr. Green and Mr. Niday; that the transfers were made; that the consideration was inadequate, and that there existed an opportunity for undue influence.

The next question is whether or not Mr. Green was in such a mental condition that his mind was no longer a safe guide for his actions.

The trial court found that Mr. Green was in a condition of extreme second childhood.

> "To use a common phrase, it was an extreme case of second childhood."

Transcript of Record, p. 40.

A detailed review of the evidence would be necessary, in order to ascertain the true mental condition of Mr. Green at the time of these transfers, and we will, therefore, refer but briefly to the evidence.

We have the testimony of Gratia Green Acuff, who was a daughter and a very close and intimate associate

of Mr. Green immediately following the death of his wife down to and including the year 1915.

Her description of her father's failing mental condition from the time of the death of his wife down almost to the time of his death is pitiful and pathetic.

She states that in 1914, after her father was moved to Boise, Idaho, he did not know her on the street.

That at times during 1914 he would endeavor to assist her with reading, but was conscious of the fact that he was no longer able to do so.

That, in the spring of 1916, her father visited her home, and gave every evidence of mental weakness.

Her testimony appears on pp. 64 to 75, inclusive, of the Transcript of Record.

Corroborating Mrs. Acuff is the testimony of George H. Moore (a disinterested party), appearing on pp. 76 to 80 of the Transcript of Record.

Mr. Moore spoke of the failing condition of Mr. Green in 1914.

On p. 83 of the Transcript of Record appears a letter written by John M. Green, a son of R. E. Green, in which it is stated that during the last eighteen months preceding his father's death he would not consider him responsible for anything he might do.

This is one of the heirs who sold out his interest to Mr. Niday and then, while on the witness stand, at-

tempted to protect Mr. Niday, but finally had to admit the correctness of the letter.

Corroborating Mrs. Acuff and his son, John Green, we have the testimony of Carrie Wager, appearing on pp. 87 to 90, inclusive, of the Transcript of Record.

Mrs. Wager took care of Mr. Green from the time he moved to Boise, in the fall of 1914, until the time of his death, and Mrs. Wager describes in detail his failing condition.

On pp. 91 to 93 of the Transcript of Record appears the testimony of a Mrs. Phillips, a neighbor of Mr. Green, who frequently visited Mr. Green's home in 1915, and who corroborates the statements as to his failing mental condition.

On p. 93 and 94 of the Transcript of Record is the testimony of Mrs. Egbert, a sister-in-law of Mr. Green, who in turn corroborates the others as to his failing condition.

On p. 96 of the Transcript of Record appears the testimony of Mr. Patterson, who was a friend and visitor at the home of Mr. Green, and who likewise corroborates the evidence of his failing condition.

On pp. 97 to 100 of the Transcript of Record appears the testimony of Mrs. Ratcliff, who was very well acquainted with Mr. Green for some thirty years, and who stated that during the years 1914 and '15 she had observed Mr. Green's mental condition, and that at times

he would not recognize her until she identified herself to him, although he had known her for thirty years.

She also states that he was unable to carry on a conversation, and that this was contrary to his general reputation and character.

Mrs. Ratcliff has no interest whatsoever in the present case.

Some evidence was offered by the appellant, which is more or less remote in character and by people not closely associated with Mr. Green during this period of time, (with the possible exception of J. L. Niday and his wife).

The trial court had the opportunity of observing the demeanor of these witnesses, their manner of testifying, and this testimony was taken in open court.

The testimony presented to this court is in a condensed printed statement.

Therefore, under the rule of law already announced, this court will not disturb the findings of the lower court as to the mental condition of Mr. Green, unless there is some serious or important mistake discovered in the consideration of the evidence.

The evidence is, however, overwhelmingly in support of the fact that Mr. Green was in a weakened mental condition at the time that he was moved to Boise, Idaho, in the fall of 1914, prior to the execution of the first deed and more than a year prior to the execution of the

second deed, and that such mental condition continued until the time of his death.

It, therefore, cannot be said that there is any want of evidence to support the court's finding as to his mental condition; and on the contrary, the evidence is overwhelmingly supportive of the fact.

This establishes the last element referred to in the beginning of this argument, to-wit, that Mr. Green was a man whose mind was no longer a safe guide for his actions at the time when these deeds were executed and delivered.

SUMMARY OF PLAINTIFF'S EVIDENCE

The plaintiff established by a preponderance of the evidence the following facts:

1. That Mr. Green, a man 80 years of age, deeded to the appellant, Niday, two hundred twelve acres of land in which he (Green) had an equity of at least $3,000.00.

2. That the land so deeded was all of the property owned by Mr. Green at the time of the transfer.

3. That there existed between Mr. Green and Mr. Niday a confidential relation of attorney and client, confidential adviser, close friendship, and that of son-in-law.

4. That the consideration for the transfers was inadequate.

5. That the deeds were, for a long time, withheld from public record, and the knowledge of their existence withheld from some of the heirs of Mr. Green.

6. That after the deeds were executed and delivered, Mr. Niday got Mr. Green to make an application to the State Land Board of Idaho for a loan of $5,000.00 and the deeds were withheld from record so that the State Land Board would not know that the transfers had been made.

This is Mr. Niday's own admission.

See Transcript, p. 119.

7. That, acting under the direction of Mr. Niday, Mr. Green wrote a letter to a friend, which letter was written against his will, and afterwards he apologized for writing the same.

8. That from the time of the death of Mrs. Green, in 1909, down to the time of Mr. Green's death, in 1917, Mr. Green was in a failing mental and physical condition, and unable to take care of himself, either mentally or physically.

These facts not only establish the existence of undue influence, but "from such circumstances imposition or undue influence will be inferred." (249 Fed. 365.)

These facts not only establish a clear case upon the part of the plaintiff, but are supported by the findings

of the trial court, which findings will not be disturbed unless this court can say that there was a "serious or important mistake made in the consideration of the evidence". (222 Fed. 760.)

These facts also cast upon Mr. Niday the burden of establishing the regularity of the transaction. (249 Fed. 365.)

> "The clearest evidence is required that there was no fraud, influence or mistake". (34 N. Y. 170.)

These facts cast upon Mr. Niday not only the burden, but "the heavy burden of proving that the transaction is characterized by the utmost fairness and good faith, and not tained with fraud or undue influence, and that the client *acted upon the fullest information and advice*". (255 Fed. 246.)

These facts establish a "presumption against the propriety of the transaction". (34 N. Y. 170.)

The usual way of repelling such presumption is "by showing that the grantor had the benefit of competent and independent advice of some disinterested third party". (65 So. 338.)

With these observations in mind, we will now review very briefly the evidence offered by Mr. Niday to maintain this *"heavy burden"* of proof.

Mr. Niday testified that in his opinion Mr. Green showed some nervousness, but that he did not think

there was any lapse of memory, and that he talked with Mr. Green almost daily from 1916 until the time of his death, during which time Mr. Green was amply able to carry on a conversation. (See Transcript, p. 105.)

That in November, 1914, he aided Mr. Green in extricating himself from debt by conveying to the First National Bank of Boise, Idaho, all of his property except two hundred twelve acres at Greenhurst and some lots in Nampa.

See Transcript, p. 108.

That afterwards Mr. Green disposed of the lots in Nampa.

See Transcript, p. 108.

That after these transactions were concluded, Mr. Green came to Mr. Niday and told him that he would like to have him take over the property known as Greenhurst, because he, Mr. Green, couldn't handle it.

That Niday told him he would consider the matter, and later agreed to take the property rather than to see it go.

Transcript, p. 110.

That Mr. Niday took the property, stating to Mr. Green that the conditions might sometimes change so that something could be gotten out of it.

Transcript, p. 110.

That thereupon the deed to the property was executed and accepted by Mr. Niday.

Transcript, p. 110.

Mr. Niday then stated that he didn't really want Greenhurst, and went on to explain that Greenhurst was a very poor piece of property.

See Transcript, p. 111.

This is the same Mr. Niday who sold Greenhurst to some of the other defendants in this case for $30,000.00.

He says that at the present time Greenhurst is not a desirable ranch, on account of alkali and other things.

See Transcript, p. 111.

Yet in December, 1918, he was glad to sell it to the present owners for $30,000.00.

This is the same Mr. Niday who, in the answer filed in the State Court, virtually admitted that he was the attorney for Mr. Green, while in the answer filed in this case denied that he was the attorney for Mr. Green some time prior to the date when the deeds in question were executed.

See Transcript, p. 30-122.

This is the same Mr. Niday who, while on the witness stand, admitted that in November, 1914, immediately prior to the execution of the first deed in question

he conducted the negotiations for Mr. Green in making conveyances of property in settlement of about $40,000 worth of indebtedness (See Transcript, pp. 106 and 107), and who looked over the contract for Mr. Green in connection with this transaction (See p. 120, Transcript of Record).

This is the same Mr. Niday who, after he received the deeds from Mr. Green, withheld them from record for a considerable period of time.

This is the same Mr. Niday who gave as his reason for withholding the deeds from record that he did not want the public officials of Idaho to know of their existence, because he wanted to get a loan on the land in the name of Mr. Green.

See bottom p. 119, Transcript of Record.

This is the same Mr. Niday who compelled Mr. Green to write an insulting letter to a friend in Nampa, Idaho.

This is the same Mr. Niday who submitted at this trial a bill for legal services against the estate of Mr. Green in the sum of $3,000.00 or $4,000.00, although such bill was not itemized and there is no showing that the bill was ever submitted to Mr. Green.

See Transcript, p. 134.

The lips of Mr. Green are sealed in death, and there is no method of rebutting the statements which Mr. Niday says that Mr. Green made to him.

It is, therefore, necessary to consider the character of the man who seeks to justify these transfers by attributing statements to the grantor.

When we look at the circumstances surrounding the execution of these instruments; when we consider that Mr. Green was a man over 80 years of age; when we consider that he was in a weakened mental and physical condition; when we consider that the deeds were withheld from record; when we consider that Mr. Niday attempted to get Mr. Green to represent to public officials that he was still the owner of the land after the conveyances were made; when we consider that information concerning these transfers was withheld from some of the other children of Mr. Green until after his death, can it be said that the statements of Mr. Niday, contained in this record, establish by the "clearest evidence" that there was no fraud, influence or mistake, and that the transaction was perfectly understood by the weaker party. (34 N. Y. 170; 255 Fed. 236.)

Instead of establishing this burden of proof, the very statements offered by Mr. Niday, himself, show that there was a secrecy and subtlety in connection with the entire transaction.

Mr. Niday stated that Mr. Green was not afraid of him, but on the contrary sought his company.

See Transcript, p. 117.

Does this prove the absence of undue influence?

How could Mr. Niday have exercised undue influence if Mr. Green had not sought his company?

Mr. Niday further testified that he aided Mr. Green in extricating himself from outstanding indebtedness, but at the same time he aided him in creating a new indebtedness of some $4,000.00 for services already performed, and for which no bill had been rendered.

Is this the clearest kind of evidence by which to establish the absence of undue influence?

Mr. Niday further testified that he took the property to relieve Mr. Green from the mortgages then on it, but he likewise testified that after he had procured the deeds from Mr. Green and before he had recorded them, he attempted to procure a loan from the Idaho State Land Board in the name of Mr. Green as the record owner, while he (Niday) was secretly claiming to be the owner.

In order to have obtained this loan from the State Land Board, he would have had to persuade Mr. Green to make an affidavit that he, Green, was still the owner of the property.

Does this testimony establish the absence of undue influence?

The question answers itself.

The record in this case establishes beyond doubt the high character and standing of Mr. Green, and such a character would not have resorted to the artifice suggested by Mr. Niday.

A man who would go from the City of Boise to Nampa to apologize to a friend for having been compelled to write an insulting letter is not the type of man who would attempt to conceal from his own government the true state of a public record.

If a man of Mr. Green's character would not have done the things suggested by Mr. Niday, then it must have been Mr. Niday, himself, who was inducing Mr. Green to perform these acts.

This character of evidence establishes not only undue influence but positive fraud, and the only weakness of the decision from which Mr. Niday is appealing is the fact that such decision does not charge him with positive fraud.

If a man who openly admits that he was a party to a transaction to conceal the true state of a public record from the officials of the government, is not guilty of positive fraud, then positive fraud can never be established by direct evidence.

In addition to the testimony of Mr. Niday, the appellant offered the evidence of his own wife to establish the absence of undue influence.

This evidence appears upon pp. 135 to 138 of the Transcript of Record.

Her testimony may be summarized in the conclusion that in her opinion her father was not mentally weak during the latter years of his life.

In this respect she is disputed by her sister, Julia Green Graef; her sister, Mrs. Acuff; her own brother, Jack Green (See letter, Transcript, p. 83); her own aunt, who lived continuously with Mr. Green, Mrs. Carrie Wager; her own friend and the neighbor of her childhood days, Mrs. Ratcliff; another neighbor, Mrs. Phillips; a disinterested business man, George Moore; her own aunt, Mrs. Egbert; and Dr. Patterson.

Furthermore, while upon the witness stand, Mrs. Niday testified as follows:

> "I did not know that he had made the transfer until after the deed was made."

See Transcript, p. 137.

When, however, her attention was called to a letter which she had written to her own sister, she became greatly confused, and her testimony accordingly weakened.

The letter stated, amongst other things, as follows:

> "It seems strange to us at this time something like 4 yrs. after Father deeded this property that such a furor should be raised about this business when not a word said during the time Father was here being cared for all of this known during that time the deed having been placed of public record."

See Transcript, p. 151, par. III.

The above letter was signed, "Niday and Mollie".

Mollie is Mrs. Niday.

The letter referred to bears date June 4th, 1918.

(See Transcript, p. 149.)

It says, "something like 4 yrs. after Father deeded the property".

This would go back to June 4th, 1914, several months before the first deed was made.

Does this indicate that Mrs. Niday knew nothing of the transfer prior to the time it was made?

We are reluctant to point out a discrepancy of this character in the testimony of one of Mr. Green's own daughters.

But she is an interested party in this case.

She is the wife of the man who procured these deeds from her own father.

She took the stand against her brothers and sisters to establish on behalf of her husband that her father was fully competent and that no undue influence was exercised over him.

Such evidence not only fails to establish the absence of undue influence, but shows the extremity to which the appellant was driven in order to justify the taking of this property from Mr. Green.

Again, on July 5th, 1918, Mr. Niday, himself, wrote to the respondent in this case, and stated, amongst other things, as follows:

> "However, I have always intended, and so stated to the members of the family here, after Mr. Green passed away, that if I could sell to advantage I would help the other members of the family, and I still intend so to do."

See Transcript, p. 161.

If there was no undue influence, and if Mr. Niday considered that he had given to Mr. Green dollar for dollar for the property which he took from Mr. Green, and that the transaction was entirely above-board, then why should he at this late date feel either morally or legally obligated to pay to the children any portion of the proceeds.

Furthermore, the following stipulation was made upon the record:

> "That prior to the commencement of this suit and prior to the conveyance of the property involved in this suit, the two sons of R. E. Green, deceased, George L. Green and John M. Green, conveyed to the defendant, J. L. Niday, all the right, title and interest which they had or have in and to the premises involved in this controversy.
>
> MR. FRASER: That is all right. It is for the purpose of confirming the title in the purchaser only."

See Transcript, bottom p. 217, top. p. 218.

If, as is now contended by Mr. Niday, there was no undue influence and he was the owner of this property, why did he have to purchase the interests of these two heirs?

This fact not only fails to establish the burden cast upon Mr. Niday to show the absence of undue influence, but affirmatively establishes that Mr. Niday, himself, must have considered the title doubtful, because a careful examination of the stipulation will show that he purchased these claims prior to conveying the property away.

It is also a significant fact that the John M. Green who conveyed his interest to Mr. Niday is the same John M. Green who went upon the witness stand in this case and attempted to support Mr. Niday by saying that his father had faith in Niday and was not afraid of him, and then when his attention was called to a letter showing the opposite said, "I was mistaken in the statements contained in the letter." (See Transcript, top p. 82.)

Then, when he was interrogated by the court, he entirely changed his front and said, "That is my letter all right. The letter is true." (See Transcript, p. 84.)

In other words, this son, John M. Green, went upon the witness stand and stated in one breath that the letter was not correct, and in the next breath that the letter was true.

This, we say, is the same Mr. Green who conveyed his interest to J. L. Niday, and the reason why we refer to his testimony in this connection is to show the close relation existing between Mr. Niday and this son, John M. Green, which in turn throws light upon the secrecy and subtlety with which Mr. Niday has attempted to surround these transactions.

It is not easy, in cases of this kind, to get at the real facts of the transaction, and it is only by such inferences from the circumstances, showing the relation of the parties, that the true spirit can be discovered.

It must be remembered, we are now discussing the evidence offered by Mr. Niday to show the absence of undue influence.

The evidence thus far referred to not only fails to show the absence of the undue influence, but establishes that character of secrecy and subtlety to which the courts frequently look in dealing with these transactions.

> "The secrecy with which the transaction is accomplished often furnishes a badge of fraud."
>
> Crabb vs. Watts, 249 Fed. 357.

In addition to the above testimony of Mr. and Mrs. Niday, the defendant introduced the testimony of Mr. Crawford Moore, who said that at the time when Mr. Green deeded the property to Mr. Moore's bank, in satisfaction of the mortgage indebtedness, that he thought Mr. Green thoroughly understood the transaction.

See Transcript, p. 124.

There is no showing that Mr. Moore was on intimate terms with Mr. Green or intimately associated with him during the time when these transfers were made.

Furthermore, the transfer to Mr. Moore was made in November, 1914, more than a year prior to the time when Mr. Green deeded the two hundred six acres to Mr. Niday.

Therefore, Mr. Moore's testimony can be of little value in determining Mr. Green's condition at the time of the principal deed to Mr. Niday.

In addition to this, Mr. Green was represented by Mr. Niday in his dealings with Mr. Moore, and was undoubtedly acting under the direction of Mr. Niday.

The next witness called was Mrs. Bowers, who stated that she never heard Mrs. Niday speak disrespectfully to her father, and cited as an evidence of Mr. Green's mental capacity, his ability to differentiate between pictures.

Her testimony can hardly stand as against the numerous other witnesses who were so intimately associated with Mr. Green.

It is certainly not that clear character of evidence necessary to prove the absence of undue influence.

The next witness called was Dr. Bowers, who was a family physician for Mr. Green and who testified that

he found Mr. Green normal, and that on Christmas, 1915, he did not notice any failure in Mr. Green's mental facilities.

Dr. Bowers, however, admitted that Mr. Green's daughter, Mrs. Acuff, called on him with reference to her father's condition, and that he tried to impress her that her father was seriously ill.

Dr. Bowers further stated that he did not remember of having told Mrs. Acuff anything regarding her father's mental condition.

But Mrs. Acuff stated that when she called upon Dr. Bowers he explained to her that for two or three years prior to her father's death her father had been undergoing a mental deterioration, which had been coming on for years, and that he, Dr. Bowers, could do nothing for it.

See Transcript, p. 147.

Dr. Bowers did not deny this statement.

He merely expressed an absence of recollection concerning it.

See Transcript, p. 144.

The next witness called was a woman by the name of Mrs. Lore, who testified, as shown upon p. 144 of the Transcript, that she did not see any signs of mental decay in Mr. Green in 1914 and '15.

On p. 148 of the Transcript, however, she said, "I was never there when Mr. Green was real sick."

Her testimony can hardly overcome that of the numerous people so closely associated with Mr. Green, and is not that clear character of evidence necessary to show the absence of undue influence.

The next witness called was Mrs. Nellie Wood.

She testified that she had known Mr. Green for more than ten years.

That she was the notary public before whom he acknowledged the deeds in controversy, and that she, likewise, witnessed the deeds.

That in her opinion Mr. Green was normal at the time when he executed these deeds.

This evidence in no way negatives the theory of undue influence, because he did not discuss the subject-matter of the deeds with the notary, and merely went through the formal procedure of executing and acknowledging the same.

The witness likewise testified that she had, on prior occasions, taken Mr. Green's acknowledgment, and this would confirm, rather than disaffirm the theory of undue influence, because if Mr. Green was accustomed to go before her it would be the natural place for Mr. Niday to send him, and thereby avoid suspicion.

Furthermore, the evidence derived from the execution of the instrument is not sufficient, as a matter of law, to overcome undue influence.

This has been decided by the Supreme Court of New York in the following language:

> "The presumption is against the propriety of the transaction, and the onus of establishing the gift or bargain to have been fair, voluntary and well understood, rests upon the party claiming, and *this in addition to the evidence to be derived from the execution of the instrument conveying or assigning the property.*"

Nesbit vs. Lockman, 34 N. Y. 167, 170.

Nowhere in the record, however, does it appear that Mr. Niday ever suggested to Mr. Green that he seek any independent advice with reference to the execution of these deeds.

The answer filed by Mr. Niday states that he did not know whether or not Mr. Green received any independent advice concerning the contents and effect of the deeds.

See Transcript, p. 35, par. XIV.

If there had been no undue influence and no secrecy, it would have been very natural for Mr. Niday to have said to Mr. Green that owing to the confidential character of their relations he did not desire to accept the

deeds unless some third disinterested person advised him as to the contents and effect thereof.

Not only was it the duty of Mr. Niday to have done this in accordance with the rule laid down by the authorities cited under Par. IX of the Points and Authorities, but it was likewise the duty of Mr. Niday to have advised Mr. Green as to the extent of his equity remaining in the property after the payment of the mortgage and endeavored to aid him in obtaining that equity.

Mr. Niday, as a lawyer, must have known the law in this particular.

The failure to have advised Mr. Green in this particular, and on that subject the record is silent, was an even more flagrant breach of duty on Mr. Niday's part than his failure to have Mr. Green seek independent advice.

The above constitutes the evidence offered by the defendant to overcome the presumption of undue influence.

As already shown by the authorities, such evidence should be very clear and convincing, because the defendant has the heavy burden of proof to establish the utmost fairness and good faith and the absence of any taint of fraud or undue influence. (255 Fed. 246.)

The evidence offered by the defendant falls far short of establishing this burden, and contains facts and circumstances which prove the presence of undue influence and positive fraud.

As before stated, all of this evidence was presented to the trial court by witnesses adduced in open court, and the record before this court is in the form of a condensed printed statement.

Therefore, every presumption is in favor of the correctness of the trial court's findings, and they will not be disturbed unless he made some serious mistake in the consideration of the evidence.

Every finding made by the trial court is amply supported by the evidence, and the evidence offered by the defendant, himself, affords ample ground for inferring the existence of fraud and undue influence.

We, therefore, respectfully assert that the findings of the court are amply supported by the evidence, and that the defendant has utterly failed to maintain the burden of proof resting upon him to show that degree of fairness and good faith which is required between parties where one of the parties is acting in a confidential capacity.

It certainly cannot be said that the trial court made any serious or important mistake in his consideration of the evidence, and the appellant will certainly fail to point out to this court any such serious or important mistake.

Under such conditions, the findings should be affirmed. (222 Fed. 763.)

The only remaining question is whether or not the court made an "obvious error" in the application of the law. (222 Fed. 763.)

The rule of law applied by the trial court to this state of facts is set forth in the body of the court's opinion, beginning at the bottom of p. 45 of the Transcript of Record.

The rule announced in the cases cited by the trial court has been so universally approved by all of the appellate courts of the United States, including this court, that we deem it entirely unnecessary to enter into any detailed review of the authorities, but the case of Strong vs. Goss, 62 Mo. 226, is so analogous in point of fact that we will make a brief reference to it.

This was a case to set aside a deed given by a woman to her son-in-law and his wife, the latter being the daughter of the grantor.

The alleged consideration for the transfer was the fact that she had been harrassed by the pressure of debts, amounting to about $4,000.00, most of which were secured by a deed of trust on the property conveyed.

The tracts conveyed were worth $9,200.00 more than the amount mentioned in the deed.

There was evidence to show that the son-in-law had agreed to assume the debts of his mother-in-law, although he was only worth about $700.00.

There was further evidence to show that he collected rent upon the property, acting as the agent of his mother-in-law.

There was also evidence that the mother-in-law still regarded herself as the owner of the land up until the time of her death.

In spite of this evidence, the court found that the conveyance could not stand.

One fact which impressed the court was the continued poverty of the mother-in-law down to the time of her death, in spite of the fact, claimed by the defendant, that he had taken the property to relieve his mother-in-law of her obligations, and afford her ample means of support.

The court concluded on this state of facts that the defendant must show,—

> "that absolute fairness, adequacy and equity characterized the transaction. The rule on this point is of universal recognition, and finds application commensurate with the existence of confidential relations. It, however, is chiefly invoked between parent and child, client and attorney, principal and agent, and patient and medical advisor; though, as before stated, it is by no means confined within such narrow limits. There exists, therefore, no necessity to show fraud, or imposition practiced on him who bestows the confidence; but simply to show that during the pendency of such intimate relations the conveyance in question was made. This being done, all of the above mentioned consequences as to the onus of proof attended the given transaction as inevitable incidents."

Strong vs. Goss, 62 Mo. 226.

The above case is strikingly analogous to the case at bar.

We, therefore, respectfully urge that the trial court not only did not make any obvious error in the application of law, but merely applied a universal principle.

We urge that the deeds in controversy should have been set aside, even though there was no undue influence or fraud, and even though there was no inadequacy of consideration, because the case at bar has the three elements constituting the presumption against a purchase by an attorney of his client's property, regardless of all other elements.

These three elements are as follows:

1. A fiduciary relation.

2. A deed of conveyance.

3. An opportunity for undue influence, which means, "not to presume fraud or coercion or any act which is malum in se, but simply the continuance of the influence which naturally inheres in and attaches to the relation itself." (154 S. W. 121; 65 So. 338; 142 Ala. 587.)

It, therefore, follows that the rule of law applied by the trial court was a correct rule, even if the court had not found the existence of undue influence.

In the case at bar, however, the evidence of undue influence is too strong to be questioned, even by the appellant himself.

There existed the relation of attorney and client.

There existed the relation of confidential advisor.

There existed the relation of life-long friend.

There existed the relation of son-in-law.

There existed, under Mr. Niday's own admissions, an influence upon his part which tried to persuade Mr. Green to represent to public officials that he was still the owner of the land after he had conveyed the same to Mr. Niday.

There existed an influence which caused Mr. Niday to submit to the heirs of Mr. Green a professional bill for $3,000.00 or $4,000.00, which bill was unitemized and had never been presented to Mr. Green, while at the same time Mr. Niday was denying the relation of attorney and client in the years 1914 and '15.

If, as stated in Mr. Niday's answer, the relation of attorney and client had ceased between himself and Mr. Green prior to December 22, 1914, and prior to October 1st, 1915, the date of the deeds, (See Transcript, p. 30, par. IV) and as asserted by Mr. Niday, Mr. Green was in full possession of his faculties, then why did not Mr. Niday present his bill to Mr. Green?

It must also be remembered that these deeds were for a considerable time kept from the public record.

It must also be remembered that Mr. Niday prepared the deeds himself.

It must be remembered that Mr. Green went to a notary public in the same building where Mr. Niday had his office.

It must be remembered that this was a notary public to whom Mr. Green was accustomed to go.

This shows how all the transactions involved were within the close surveillance of Mr. Niday.

The above pieces of testimony and circumstances, however fragmentary in character, make a completed whole when pieced together, and point strongly to a continued influence at work.

By the logical processes of elimination, only three people appear in the transactions:

R. E. Green, J. L. Niday and Mrs. J. L. Niday.

We, therefore, respectfully contend that regardless of the failure of the defendants to overcome the powerful presumption of undue influence arising out of a confidential relation, the evidence introduced upon the trial, and the logical inferences to be deduced therefrom, positively establish the existence of fraud and undue influence.

We also respectfully contend that there is sufficient evidence of undue influence and fraud to warrant setting aside the deeds in controversy, even if the consideration had been adequate, because we have present the three elements, a fiduciary relation, a deed of conveyance to the confidential advisor, and an opportunity for undue influence. (154 S. W. 121.)

We also have a weak man who has conveyed all of his property, leaving himself to be fed and clothed at the pleasure of some other party. (21 Md. 352.)

We also have a conveyance from a client to an attorney given without "the fullest information and advice." (255 Fed. 242.)

We also have a case where the transaction was not perfectly understood by the weaker party. (34 N. Y. 167.)

We also have a case where the weaker party received no independent advice of a third disinterested party. (65 So. 337.)

We also have a case where the grantor made no reasonable provision for his own children, not even for himself. (207 S. W. 695.)

We likewise have a case where the fact of the existence of the deeds to the confidential advisor was withheld from several of the heirs until after their father's death.

The case certainly comes within the rules of law announced by the decisions which have been cited and which seem to represent a universal harmony of opinion.

Not only does the case come within the purview of the doctrine announced, but we likewise have a case which seems to us to possess all the elements of positive fraud, and it is our opinion that the court should have so held.

It is difficult for one to understand how there could be a distinction between positive fraud and undue influence in a case where the undisputed record shows that

the defendant influenced an old man almost 80 years of age to misrepresent to public officials the true state of a public record.

We, therefore, urge not only that the decision of the trial court should be affirmed, but that a finding should be made charging the appellant with actual fraud in the transaction, and thereby deprive him of the benefits which he has reaped out of the very fraud which he perpetrated.

LACHES

The appellant contends that the court erred in not finding that the respondent was guilty of laches.

The case in the State Court was started in January, 1919, a little over six months after the plaintiff learned of the existence of the deeds.

She first learned of these deeds in April of 1918.

See Transcript, top p. 59-60.

Some time was occupied in negotiations with reference to an adjustment of the controversy.

After the case was started in the State Court, new conditions arose which brought about the institution of the present litigation in March, 1920.

The trial court found against this contention of laches, and this finding, based upon all the circumstances,

is supported by enough evidence to warrant its affirmance.

The defense of laches is used to promote justice, but never to defeat justice, and is never applied unless unusual conditions require its application. Smith vs. Smith, 224 Fed. 1, 6. (C. C. A. Ninth Circuit.)

Furthermore, the case at bar was begun in January, 1919, within approximately six months after the plaintiff discovered the deeds, during which time she was negotiating for a settlement, and would have been tried in the county where the property was situated had not the defendant delayed the matter by requiring its removal to the City of Boise, where there was a more congested court calendar.

Furthermore, Mr. Niday, himself, made no detailed explanation of the conditions until July 5th, 1918, over a year after the death of Mr. Green. (See letter, p. 156, Transcript of Record.)

Where the party interposing a defense of laches "contributed to or caused the delay, he cannot take advantage of it." Nor. Pac. vs. Boyd, 177 Fed. 804, 824. (C. C. A. Ninth Circuit.)

Even the other two children, Mrs. Acuff and Philo F. Green, who assigned their interest to Mrs. Graef, and who learned of the deeds shortly after their father's death, did not have any means of ascertaining the true facts concerning the situation.

They were apparently relying upon Mr. Niday as a member of the family and as a lawyer.

Under these circumstances, a negligent delay amounting to laches could not be imputed to these parties, because at most the transaction was instituted within the period of the statute of limitations of the State of Idaho.

As before stated, however, the court's finding in this particular was against the defense of laches, and the court's review of the facts surrounding the institution of this litigation is very full and complete. (See pp. 46, 47, Transcript of Record.)

These findings are amply supported by the evidence, and should be affirmed.

RIGHT OF PLAINTIFF TO MAINTAIN SUIT AS ASSIGNEE.

Appellant contends that the plaintiff did not have a right to maintain the present suit in the Federal Court as assignee of the interests of her brother and sister.

The trial court went into this question carefully, and determined from the evidence that there had been a bona fide transfer of these claims to the plaintiff without the retention by the assignors of any interest in the litigation.

The court's finding in this particular is supported by evidence, and is therefore binding and comes directly

within the case of Dickerman vs. Northern Trust Co., 176 U. S. 181, where it is held that in the case of such an assignment the court will not inquire into the motive of the assignment if a consideration was actually paid.

This assignment was the assignment of an interest in a trust estate, and is such a right as can be maintained by an assignee in the Federal Court.

This was decided in the recent case of Brown vs. Fletcher, 235 U. S. 589.

We, therefore, urge that the ruling of the trial court on this question of assignment was proper and should be affirmed.

The defendant also made objection that the plaintiff had not offered to do equity, and could therefore not maintain her bill.

As the trial court suggested, however, if this objection had been raised at the threshold the plaintiff might have been required to make such an offer by amendment; but that, under the circumstances, the question was not raised until after the trial, and the court had jurisdiction to determine an accounting which would do equity to all parties.

The court's finding in this particular is so equitable (See Transcript, p. 48) that further comment upon the subject is not necessary.

This disposes of all the contentions presented by the appellant.

This is a court of equity.

Is such a court of equity going to say to the appellee, in accordance with the contention of counsel for the appellant, "It is true that Mr. Green's mental faculties were impaired; it is true that he was not capable of transacting business as in former days; it is true that the consideration was not entirely adequate; it is true that Mr. Green did not give full consideration to the effect of these deeds; it is true that by giving these deeds he pauperized himself entirely; it is true that a man wholly in possession of his faculties would not, under the history of this case and the circumstances of the execution of these deeds, have voluntarily surrendered his last vestige of property; it is true that there is no evidence of an understanding upon the part of Mr. Niday to support Mr. Green; it is true from the face of the record in this case that Mr. Niday did not support Mr. Green; it is true that suddenly, and without any previous discussion, Mr. Green, though in financial straits, determined to pay to Mr. Niday, his own son-in-law, (according to Mr. Niday's own testimony) a large sum of money for professional services, for which no claim has ever been made, and which sum is now brought forth by the said Niday as part of the consideration for the deeds; it is true that a confidential relation of an unusually close nature existed between Mr. Green and Mr. Niday, that of father-in-law and son-in-law, that of attorney and client, that of friend; it is true that under the testimony most strongly in favor of the appellant, Mr. Green had a minimum unincumbered equity in the property of $3,000.00; it is true that a deed to an attorney from a

client is looked upon with suspicion, and the law demands that the client and weaker party must fully and completely understand the nature of the transaction, and when the stronger party is an attorney, should have the benefit of independent advice. (65 So. 338.) It is true that even one heir may maintain an action to set aside an ancestral conveyance procured by undue influence, (Harding vs. Hardy, 11 Wheat 103, Smith vs. Meaghan, 28 Hun. 424); it is also true that the appellants have waived any question as to the capacity of the appellee to sue by pleading over (141 U. S. 127); but nevertheless, this court as a court of equity says to you, as an injured heir of R. E. Green, 'Go hence; the law affords you no remedy'."

Or will this court say, as did the trial court in the language of its time-honored maxim that "For every wrong, equity affords an adequate remedy."

Respectfully submitted,

PLATT & PLATT, MONTGOMERY & FALES,
Solicitors for the Plaintiff.

HUGH MONTGOMERY,
Of Counsel.

BRIEF OF CROSS APPELLANT.

STATEMENT

After the rendition of the decision in the present case a hearing was held with reference to the determination of the accounting between the parties which was provided for in the decision of the court.

This accounting occurred after the trial, and the appellee took certain exceptions to the rulings of the court in reference to the account which the court ordered.

The exceptions referred to are fully set forth in the assignment of errors appearing upon pp. 263 to 266, inclusive, of the Transcript of Record.

We will, therefore, discuss these exceptions in the order set forth in the assignment of errors.

Assignment I.

After the first hearing, held before the court on the subject of accounting, the court entered an interlocutory decree, which appears on pp. 50 to 54, inclusive, of the Transcript of Record.

This interlocutory decree provided that the deeds in question were voidable at the instance of the grantor and his heirs, and then confirmed the title in the purchasers of the property, who had purchased the land from the appellant, Niday.

The final decree, which appears upon pp. 54 to 56, inclusive, of the Transcript of Record, follows the interlocutory decree in this particular.

The prayer of the plaintiff's complaint was for a decree declaring null and void the deeds from Mr. Green to Mr. Niday, or for a decree declaring that Mr. Niday held the property in trust for the plaintiff.

The court refused to enter the decree proposed by the plaintiff, as shown on p. 255 of the Transcript of Record, setting aside the deeds, and adopted the latter theory of a constructive trust in favor of the appellee.

The appellee had agreed upon the trial of this case that if a decree was entered in her favor, her title might be quieted in the purchasers of the property.

These purchasers had pleaded the defense of bona fide purchasers for value, and the appellee expressed a willingness to accept this sale without compelling them to prove their defense.

She, therefore, made the stipulation suggested.

In view of the fact, however, that the court had refused to enter a decree setting aside the conveyances, and had instead declared that Mr. Niday was a trustee for the benefit of the plaintiff, to the extent, at least, of the interests represented by her, the appellee insisted that Mr. Niday should be compelled to account for the profits arising out of the transactions since the date when he acquired the property.

This request was presented in the form of a proposed decree, and appears at the top of p. 258 of the Transcript of Record.

This the court refused to do, and is the principal objection raised by the cross appellant.

The trial court determined as a question of fact, and concluded as a proposition of law, that owing to the existence of a confidential relation between Mr. Niday and Mr. Green, and the existence of a species of undue influence arising out of said relationship, that the transfers in controversy could not be sustained.

Having determined this proposition, the court was compelled either to set the deeds aside or to declare a constructive trust in favor of the plaintiff.

In view of the situation of the parties and the willingness of all parties to protect the purchasers of the property, the court adopted the latter remedy.

It appeared by the stipulation of the parties, however, that Mr. Niday had purchased the interest of two of the heirs of R. E. Green, in his own right, before he made a sale of this property.

He, therefore, made such purchase while a legal trustee of the heirs of R. E. Green.

Under such circumstances, he could not be permitted to make any profit out of the transaction.

See Baker vs. Schofield, 221 Fed. 322 (C. C. A. Ninth Circuit).

The record does not show what amount Mr. Niday paid to these heirs for their respective interests, because he was not compelled to account in this particular.

But we are advised that he paid to each of them the sum of $1,500.00, either in cash or its equivalent.

Each of these heirs was entitled to a one-sixth interest in the $30,000.00 for which the property was sold, after deducting moneys actually advanced by Mr. Niday.

If this interest was of greater value than the amount Mr. Niday paid for such interest, then he should account to the other heirs for the profit which he made out of the purchasers.

Because, under the decision above cited a trustee cannot become the purchaser of the trust property and make a profit out of the transaction.

This rule was also announced by the Supreme Court of the United States in the famous case of Michoud vs. Girod, 4 Howard 504.

In addition to this, Mr. Niday should be compelled to account to the heirs for any profit which he made out of the sale of the property to the other defendants in this case.

The trial court refused to order this form of accounting, and we respectfully urge that the court was in error

in this particular, and that a decree compelling such an accounting should be entered by this court.

The trial court found that Mr. Niday was guilty of violating the confidential relation which existed between himself and Mr. Green.

This made Mr. Niday a wrong-doer in procuring these deeds from Mr. Green.

Nothing which he did thereafter could change his position in this particular.

Therefore, under no circumstances should he be awarded a profit for his wrong-doing.

The most that Mr. Niday would be entitled to would be the actual moneys he had spent in preserving the property, without sharing in the profits of the sale.

Under the decree actually entered by the trial court, Mr. Niday was not only given back the moneys which he spent in preserving the title to the property, but was likewise permitted to share in the profits of the transaction.

We respectfully urge that the decree of accounting should be reformed in this particular.

All the profits which were made out of this transaction should go to the heirs of Mr. Green, who were injured in the first instance by the wrongful act of Mr. Niday.

Assignment II.

The court awarded to Mr. Niday the sum of $900.00 as money alleged to have been paid to Mr. Green in connection with the conveyance of the six acres, being the deed dated December 22, 1914.

This sum was worked out upon the theory that it was the proportionate value of the six acres to the two hundred twelve, figuring on the basis of $150.00 an acre.

In his original decision, the court held that the rules of law which he had announced as invalidating the transfers in question included the six acres as well as the two hundred six acres.

In other words, it included the deed of December 22, 1914, as well as the deed of October 1st, 1915.

On the hearing in reference to the accounting, however, Mr. Niday attempted to point out some particular testimony which he had given in reference to the first deed.

This particular testimony appears on the bottom of p. 118 and the top of p. 119 of the Transcript of Record.

In other words, Mr. Niday tried to show that at the time when the first deed was executed, Mr. Green said that he would be in need of money, and therefore executed to Mr. Niday a deed to the six acres on the theory that Mr. Niday would thereafter advance to him some money as a consideration for this deed.

Now, the fact remains that the deed itself recited a consideration of $1.00, as found by the court in his original opinion.

Furthermore, Mr. Niday attempted to state in the earlier part of his testimony (See top of p. 118) that he had advanced a considerable sum of money to Mr. Green from time to time, although it appears that a large part of such moneys was for taxes and interest in connection with the property in controversy.

But this claim for moneys advanced was never presented to the Probate Court, where Mr. Green's will was probated by Mr. Niday, himself, and was reserved as a defense to the present trial.

In his main decision, the trial court held that owing to the circumstances and the confidential relation existing between Mr. Niday and Mr. Green, that no theory had been advanced upon which the transfers could be allowed to stand, because taking the property at its lowest valuation there was an equity in favor of Mr. Green of some $3,000.00, and that, therefore, this $3,000.00 would have been enough to take care of his expenses.

For this reason, the trial court very properly refused to allow Mr. Niday to make an offset of the $2,800.00 which he claims to have advanced to Mr. Green, but he did allow Mr. Niday a portion of that offset to the extent of the six acres which Mr. Green deeded to Mr. Niday.

Now, the six acres which Mr. Green deeded to Mr. Niday was the only unincumbered property which Mr. Green had.

If Mr. Niday had been really acting in the interests of Mr. Green, he should have gone out and endeavored to sell this six acres for Mr. Green, or else get him a loan of money on this six acres.

Instead of doing this, however, he took a deed to the property while the confidential relation existed, without in any way advising Mr. Green as to the effect of the deed or without in any way attempting to get a loan for him on the property, and then when the lips of Mr. Green are sealed in death and his heirs seek to question these transfers, the same man who took the property from Mr. Green now attempts to assert on the witness stand that there was a definite understanding between himself and Mr. Green as to moneys to be advanced in connection with this six acres.

If the trial court did not believe Mr. Niday when he said Mr. Green owed him $3,000.00 or $4,000.00 for legal services, and did not believe him in connection with the other transaction, neither should he have believed him when he said, as shown at the bottom of p. 118 of the Transcript of Record, that he had a definite understanding with Mr. Green regarding this six acres.

This is especially true when the heirs of Mr Green have no means of rebutting this testimony, and when the

deed itself did not recite such a consideration, and when it appears, as already shown that Mr. Niday withheld this deed from record from its date, December 22, 1914, until the spring of 1916, and then concealed the existence of this deed from the heirs of Mr. Green, and likewise attempted to conceal the transfer from the State Land Board.

Furthermore, at all stages of the transaction Mr. Niday has treated the transfers as an entirety, and finally sold the whole property as an entirety, including the six acres, for the sum of $30,000.00.

Under such circumstances, we respectfully urge that there is no way of segregating the six acres from the balance of the property, and therefore this allowance of $900.00 should not be given to Mr. Niday.

It is impossible to understand why Mr. Niday should have been allowed this $900.00 instead of any other sum.

Under the decree of the trial court, Mr. Niday became a trustee of the title for the benefit of the plaintiff, and was given the actual moneys spent by him in preserving that title for the plaintiff.

We cannot understand on what theory any other sum should be awarded to him.

Any claim which Mr. Niday had against the estate of Mr. Green for personal advances has nothing to do with the trust relation existing between Mr. Niday and the appellee in reference to the property involved in this case.

If Mr. Niday had a legitimate claim against the estate of Mr. Green for $900.00 advanced in connection with this deed for six acres, he should have presented it to the Probate Court in Idaho when the will of Mr. Green was probated.

We respectfully urge that the decree should be reformed in this particular.

ASSIGNMENT III.

The above assignment discloses that the trial court awarded to Mr. Niday the sum of $900.00 for personal services in supervising the property in controversy during the time when he held it.

Now, it appears that Mr. Niday claimed this property under the deeds from Mr. Green.

It further appears that he procured a half interest in the property before he sold it, by deeds from the two sons of Mr. Green.

(See top of p. 218, Transcript of Record.)

The property which the decree of the court awarded to the appellee was obtained by undue influence.

Now, if Mr. Niday owned the property, he certainly should not be given $900.00 for supervising his own property.

If he improperly obtained the title as the court held in his decision, then certainly he should not be entitled to

$900.00 or any portion of it for supervising property which he had wrongfully taken from Mr. Green.

The sum of $450.00 or half of this $900.00 was charged to the appellee.

Again, a trustee is not entitled to a commission for wrongfully dealing with the trust property.

By making this sale, he compelled the plaintiff to accept the same, in order to protect innocent purchasers.

He should not receive a commission for placing the plaintiff in this situation.

On either theory, we think this was an improper charge, and should not have been allowed.

Assignment IV.

Assignment IV discloses that the court allowed to Mr. Niday a commission of $1,500.00 for selling the property to the defendants Green and Buell.

One-half of this was charged to the appellee, or the sum of $750.00.

Certainly Mr. Niday should not be allowed a commission for selling his own property.

Certainly he should not be allowed the sum of $1,500.00, or any other sum, for selling property which he had wrongfully taken from the appellee.

This would again be rewarding a man for his own wrong-doing, because the appellee did not employ him to sell her property, and she might doubtless have made a better sale, or perhaps have preferred to take the property itself.

Furthermore, a trustee is not entitled to compensation for violating his trust.

In any event, we earnestly urge that this was not a proper allowance to a wrong-doer, and that the decree should be reformed in this particular.

Assignment V.

Assignment V relates to interest allowed on moneys which Mr. Niday advanced.

Mr. Niday asserted that he had paid out certain sums in preserving the property.

This money was composed of taxes and other items.

Undoubtedly, Mr. Niday would be entitled to a credit for moneys actually advanced; but the court not only gave him the moneys which he actually advanced, but gave him interest on those moneys in excess of the statutory rate provided for by the laws of the State of Idaho.

That statutory rate is seven per cent.

The court allowed him eight per cent.

In other words, the court gave him a profit of one per cent on all the moneys which he had avanced in preserving the property which he had wrongfully taken from Mr. Green.

We again assert that a trust violator is not entitled to recover profit from his wrong-doing (221 Fed. 322).

We, therefore, respectfully assert that the decree should be reformed in this particular, and that Mr. Niday, if he is allowed any interest at all, should be confined to the statutory rate.

Assignment VI.

Assignment VI refers to the amount of money which the appellee was compelled to deposit, in order to get a return of the property which had been unlawfully taken from her father.

The sum thus allowed was made up of moneys advanced, together with the various allowances already referred to, and then half of it was charged to the appellee.

Under the interlocutory decree entered by the trial court the appellee was compelled to deposit the sum of $4,313.47 to the credit of Mr. Niday, before she was entitled to a decree.

(See Transcript, bottom p. 53.)

The court further held that if she did not make this deposit, that her case would be dismissed with prejudice.

In other words, the appellee established to the satisfaction of the court that Mr. Niday had improperly taken this land from her father, and that there was no theory upon which the transaction could be allowed to stand.

(See bottom p. 44, Transcript of Record.)

But before she was allowed to gain the benefit of her rights and to obtain the property which had been unlawfully taken from her, she was compelled to put up this large sum of money even without any chance to appeal and have the question determined.

Fortunately, the appellee was able to borrow this money from her husband, and deposited the same under protest.

(See p. 254, Transcript of Record.)

We respectfully urge that a trust violator was not entitled to this protection, and that the appellee should have been allowed, as suggested in the proposed decree presented by her, to have whatever moneys were owing to Mr. Niday by way of advancements charged against her share of the mortgage outstanding against the property.

In other words, Mr. Niday procured one-half of the property in controversy by deeds from some of the heirs of Mr. Green, while a trustee.

Thereafter, he sold the half thus procured, together with the half that did belong to him.

He made certain advancements to preserve the property.

These advancements were voluntarily made.

Therefore, the most that he could claim by way of reimbursement would be the right to have his legitimate charges for reimbursement taken out of the share of the proceeds coming to the appellee when the mortgage was finally paid.

If any other rule was applied, then we would have a situation where an injured heir might make out, as she did in this case, that the property of her father had been improperly taken from her.

Yet, before she could obtain that property, she would be compelled to advance a very large sum of money.

She would be compelled to buy her legal rights.

If this rule was allowed to stand, then no person without money could ever recover their rights.

Assignment VII.

Upon the hearing for an accounting, the appellee presented to the court an itemized statement of expenses which she had been compelled to pay out in order to maintain the present action.

These expenses were composed of $413.64, which was actually paid out by the appellee in traveling and

other expenses in going from Portland to Boise, Idaho, to take care of this litigation, and likewise the sum of $1,500.00 as attorneys' fees.

These claims the court denied upon the ground that the appellee should be confined to her statutory costs.

The court also suggested that Mr. Niday had not been guilty of such fraud as required the imposition of a penalty.

But when we consider the findings of the court, the fact that Mr. Niday had induced Mr. Green to make a false affidavit to public officials regarding a public record; had withheld these deeds for a long time; had concealed them from the heirs of Mr. Green; and had attempted to resell this property at a big profit, it seems to us that Mr. Niday was guilty of the grossest kind of fraud.

Under such circumstances, we feel that the appellee should be compensated, in addition to her statutory costs, for the actual moneys which she had been compelled to spend in recovering her rights.

These items are set forth on p. 215 of the Transcript of Record.

We respectfully urge that the decree should be corrected in this particular, allowing such items as an offset on the claims if Mr. Niday is allowed any profit in the transaction.

Assignment VIII.

Assignment VIII is practically a duplicate of Assignment VI, and urges that the court was incorrect in requiring the plaintiff to deposit a large sum of money before obtaining a decree, and thereby shutting her off from the right to have such action reviewed on appeal, without the payment of money.

Assignment IX.

Assignment IX deals with the same subject of allowing Mr. Niday any profit out of the transactions involved in this case.

We desire to cite the following rule:

> "If an agent to sell effects a sale to himself under the cover of the name of another person, he becomes, in respect to the property a trustee for the principal, and at the election of the latter, seasonably made, he will be compelled to surrender it, and if he has disposed of it to a bona fide purchaser to account, not only for its real value, *but for any profit realized by him on such sale.*"
>
> Baker vs. Schofield, 221 Fed. 322, 332 (C. C. A. Ninth Circuit).

Under the decision rendered by the trial court in this case, Mr. Niday violated the fiduciary relation existing between himself and Mr. Green.

By virtue of that violation, he became interested in the property not only by virtue of the deeds from Mr. Green but by virtue of purchases subsequently made from some of the heirs of Mr. Green.

Therefore, under no circumstances should he be allowed to make any profit out of the transactions.

This is doubly true in a case like the present, where Mr. Niday was guilty of the gross acts of fraud already suggested.

We, therefore, respectfully urge that the decree in question should be reformed by eliminating therefrom the allowance of $900.00 in connection with the first deed; the allowance of $900.00 for supervising the property; the allowance of $1,500.00 as a commission for selling the property; the allowance of eight per cent on moneys advanced; the allowance of $4,313.47 in cash, which allowance, if any, should be charged against the proceeds arising from the mortgage, and by eliminating therefrom any profit to Mr. Niday growing out of the transactions involved in this case.

The decision of the court and the main decree should be affirmed, but the order of accounting should be modified in the particulars suggested.

Very respectfully submitted,

PLATT & PLATT, MONTGOMERY & FALES,
Solicitors for Appellee.

HUGH MONTGOMERY,
of Counsel.

ADDENDA

After the preparation of this brief, we received a copy of the brief for appellant, which sets forth as the principal ground for the reversal of this decision the defense of laches.

Appellant's brief contains copious quotations from numerous decisions announcing the doctrine of laches.

All of these decisions may be distinguished from the case at bar.

In accordance with the decree of the trial court, the appellant became a trustee of the title to the real property involved, for the appellee, by virtue of a constructive trust arising from a violation of the confidential relation existing between Mr. Niday and Mr. Green.

Mr. Niday virtually admitted the existence of the trust, in the following language:

> "However, I have always intended, and so stated to the members of the family here, after Mr. Green had passed away, that if I could sell to advantage I would help the other members of the family, and I still intend so to do. In this all will be treated alike without discrimination. * * * I will carry out the purpose above stated, not as a legal obligation, but with the feeling that if I make something out of the property I would like for the children all to share in it, not equally with me, as I am the one who assumed the responsibility and took the risk, but substantially."

Transcript, p. 161.

The doctrine of laches, as applied to such a situation, has been set at rest by the Supreme Court in the following language, which has already been referred to in this brief:

> "* * * Within what time a constructive trust will be barred must depend upon the circumstances of the case. There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life-time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

Michoud vs. Girod, 4 Howard 504, 561.

Therefore, none of the cases which counsel for the appellant has cited in any way applies to the case presented by this record.

Even, however, if the decree in this case had directly set aside these deeds for fraud and undue influence, nevertheless the cases cited by counsel for the appellant would, in our opinion, be inapplicable.

The following observations distinguish these cases:

The first case cited by counsel for appellant is the case of Harris vs. McGovern, 99 U. S. 161.

This was an action in ejectment, and the court applied the regular statute of limitations to a law action.

Meeks vs. Olpherto, 100 U. S. 564, was a law action to recover possession of real property, and the court applied the statute of limitations.

Castro vs. Geil, 42 Pac. 804, 805, specifically states that "the doctrine of laches, as applied in equity, need not be considered."

Chicago T. & M. C. Co. vs. Tillington, 19 S. W. 474, specifically states that "fraud prevents the operation of limitation only so long as it remains undiscovered."

In the case at bar, the withholding of the deeds from record, then secretly recording them, was no notice of the fraud.

It almost decived the state officials, according to Mr. Niday.

Morgan vs. Morgan, 38 Pac. 1054, specifically points out that the trial court found that plaintiff had "discovered all the facts constituting the fraud more than four years before the commencement of the action. She had enough actual knowledge to set the statute running."

This was a pure question of fact, and contrary to the findings of the trial court in the present case.

Swift vs. Smith, 79 Fed. 709, specifically states on p. 713 of the opinion that there had been a delay in the

action from 1871 to 1891 and that the plaintiff was "not the victim of any actual fraud or of any concealment". All the facts were within her reach.

Such facts were entirely different from the case at bar.

Ware vs. Galveston City, 146 U. S. 102, specifically stated that the cause of action arose in 1841 or '42; that in 1854 and in 1858 the plaintiff obtained information enough to put him on inquiry, and the suit was not commenced until twenty-three years thereafter.

To this state of facts, the court applied the doctrine of laches.

There is no analogy between this case and the case at bar.

Teal vs. Schroeder, 158 U. S. 172, holds that after twenty-four years of undisputed possession of land the statute of limitations of California shuts out the claims of all other persons.

This is the established doctrine of adverse possession, and has no analogy to the case at bar.

The case of Moore vs. Nickey, 133 Fed. 289, decided by Judge Gilbert, specifically found that the bill of complaint which was for the delivery of certain certificates of stock was not filed for more than nine years after the instrument upon which the suit was brought.

On this state of facts, and on the peculiar circumstances surrounding the immediate case, the court applied the doctrine of laches.

Furthermore, the case held that there was no allegation or proof that any of the defendants deceived the plaintiff as to the extent or cessation of the mining operation or as to the value of the property.

This case is altogether without any analogy to the case at bar.

The case of Tilton vs. Bader, 164 N. W. 871, set forth on p. 21 of appellant's brief and so strongly relied upon by the appellant, is a case from which it specifically appears that "conceding all parties connected with the case were aware of the making of the deed the day signed, more than five years and less than ten had elapsed when the action was begun".

The case then goes on to hold that a suit to set aside a deed obtained by fraud is an action to recover real property, and therefore did not, under the laws of the State of Iowa, have to be brought until ten years after the cause of action accrued.

On the theory of this case, the present case would not have to be brought until five years after the action accrued, because that is the statute of Idaho governing actions for the recovery of real property.

Therefore, even on appellant's own theory the plaintiff began her original action in Canyon County in Jan-

uary, 1919, which was considerably less than five years from the date of the first deed.

The present case was afterwards instituted in the Federal Court, in March, 1920, whereas the second and larger deed was not made until October 1st, 1915, which would determine that the statute did not run until October 1st, 1920.

Therefore, the present action was brought within the proper period of time, assuming that the statute began to run on the dates of these deeds.

Therefore, this very case supports the position of the appellee, and not that of Mr. Niday.

This case, however, in no way changes the old and well established rule that fraud stays the running of the statute until its discovery.

If the rule were otherwise, then anyone might procure a deed by fraud and avoid the fraud by recording the deed.

Such cannot be the law, and equity has always relieved from fraud not apparent on the record.

Furthermore, none of the cases above cited changes the rule laid down in

> Michoud vs. Girod, 4 Howard 502.
> Baker vs. Schofield, 221 Fed. 322, 334 (C. C. A., Ninth Circuit).

In the case at bar, the decree of the court did not set aside the deeds, but awarded to the plaintiff an interest in the securities, on the theory of a constructive trust.

Therefore, laches would not run during the life-time of either of the parties following the discovery of the fraud.

In addition to this, all of the cases above referred to, as cited by the appellant Niday, have an entirely different state of facts from the case at bar.

Furthermore, as already set forth in our original brief, the doctrine of laches is never invoked to defeat justice, and never applied unless unusual conditions require its application.

> Smith vs. Smith, 224 Fed. 1, 6 (C. C. A., Ninth Circuit).

Again, the party interposing a defense of laches cannot take advantage of it if he has contributed to the laches.

> Nor. Pac. Co. vs. Boyd, 177 Fed. 804, 824 (C. C. A., Ninth Circuit).

The other cases cited by the appellant on the question of tendering equity have no application to the case at bar, because the court required the plaintiff to make a tender and return to the defendant of all benefits received, as a condition precedent to the entry of the decree.

Furthermore, if it was necessary that the complaint be amended to show a tender of equity, such amendment could be made at any time, even in this court, under Sec. 954 of the Revised Statutes of the United States.

This question is, however, supertechnical; was not raised by the defendant until after the trial of the case, and his rights were in no manner affected thereby, because he was protected by the accounting.

All the other contentions set forth in the brief of the appellant have been answered in our main brief.

Respectfully submitted,

PLATT & PLATT, MONTGOMERY & FALES.